

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 14-B9:

BILLINGS FIRE FIGHTERS UNION,
LOCAL NO. 521,

Complainant,

- VS -

ALAN TANDY, CITY ADMINISTRATOR,
CITY OF BILLINGS, MONTANA,

Defendant.

FINAL ORDER

Having reviewed all pleadings in this matter, the Board of
Personnel Appeals Orders as follows:

1. That the Board's Final Order, dated October 18, 1989 be
rescinded.

2. That the Findings of Fact, Conclusions of Law and
Recommended Order of the Hearings Examiner dated September 28,
1989 be adopted as the Final Order of this Board.

DATED this 5 day of January, 1990.

BOARD OF PERSONNEL APPEALS

By Robert R. Jensen
Robert R. Jensen
Administrator

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 14-89:

BILLINGS FIRE FIGHTERS UNION,)
LOCAL 521,)

Complainant,)

-vs-

ALAN TANDY, CITY ADMINISTRATOR)
CITY OF BILLINGS, MONTANA,)

Defendants.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW;
RECOMMENDED ORDER

* * * * *

I. INTRODUCTION

A hearing on the above matter was held on June 6, 1989, in Billings, Montana before John Andrew. Billings Fire Fighters Union, Local 521 was represented by Jeffrey T. Renz. The City of Billings was represented by James Tillotson.

A pre-hearing order was filed with the hearing examiner on June 6, 1989. The matter was briefed and submitted on July 14, 1989. All argument being considered the hearing examiner now makes the following:

II. ISSUES

1. Whether the City of Billings violated 39-31-401(1) and (5) MCA.

2. Whether the City has the right pursuant to Article II of the Collective Bargaining Agreement and 39-31-303 MCA, to create or eliminate the position of Battalion Chief within the Billings Fire Department.

1 3. Whether the December 1988 amendment to the
2 Collective Bargaining Agreement contractually set the number
3 of battalion chiefs at four, thereby prohibiting the City
4 from increasing or decreasing the number of Battalion Chiefs
5 without the agreement of Local 521.

6 III. FINDINGS OF FACT (One through six as stipulated)

7 1. Complainant is a labor organization, and is the
8 exclusive representative of the employees of the Billings
9 Fire Department, except the Fire Chief, Assistant Chief, and
10 all initial probationary employees.

11 2. The City of Billings is a public employer.

12 3. Defendant and Complainant entered into a collective
13 bargaining agreement with effective dates of July 1, 1987 to
14 June 30, 1989.

15 4. The Collective Bargaining Agreement was amended on
16 December 8, 1988.

17 5. The Collective Bargaining Agreement, as amended,
18 represents the entire agreement between the Defendant City
19 and the Complainant.

20 6. The Board of Personnel Appeals has jurisdiction over
21 this matter.

22 7. As early as the spring of 1988 former Fire Chief
23 Bobby Williams and City Administrator Alan Tandy discussed
24 the creation of a fourth battalion chief position. Chief
25 Williams wanted a fourth battalion chief position. From

1 November of 1988 pending appointment of a new Fire Chief Dick
2 Blee has been the acting Fire Chief.

3 8. Nothing in the collective bargaining agreement
4 prior to the December 8, 1988 amendment provided for a
5 minimum or maximum staffing level for battalion chiefs. The
6 collective bargaining agreement, did, however, set hours for
7 all combat fire personnel. Hours of work for combat fire
8 personnel clearly had to be negotiated and any unilateral
9 change in hours would have been an unfair labor practice
10 unless the right to bargain had been waived by the Union.

11 9. The amendment to the collective bargaining agreement
12 (Plaintiff's Exhibit 10) is under Article VI, Hours of Work
13 and Compensation. Section A contains the new language. The
14 new language provides that:

15 One Battalion Chief (the fourth) shall be assigned a
16 regular work schedule as follows:

17 The language then spells out the schedule. The City contends
18 that this amendment merely sets the work schedule of a fourth
19 battalion chief. It does not guarantee there will be a
20 fourth battalion chief. Local 521 contends the amendment
21 requires a fourth battalion chief. On the face of the
22 contract either interpretation is possible.

23 10. The relevant portions of the paper trail pertaining
24 to the contract amendment read as follows:
25

1 The new BC's positions (sic) is in the 88/89 budget.
2 Chief has not received authorization from City Hall to
3 fill the position. (Plaintiff's Ex. 1 at paragraph #8,
4 an informational notice of 11/15/89).

5 Plaintiff's Ex. 2 (dated 1/14/89) at paragraph #13 reads:

6 The 4th BC's position and work schedule was discussed.
7 Union will be negotiating with the City on the 4th B.C.

8 Plaintiff's Ex. #3 (dated 2/8/89) at paragraph #1 reads:

9 Chief Blee reported that City Administration had
10 approved the 4th BC's position, and now it will be up
11 to the Union to approve it. More will be out on this.

12 The notices, individually or collectively, do not
13 conclusively support the position of either the City or the
14 Union. The notices could be interpreted two ways. They
15 could mean that negotiations were only to be over hours of
16 work - the position of the City - or they could mean
17 negotiations were to include whether there would be a fourth
18 battalion chief.

19 11. On December 8, 1988, the City announced the
20 battalion chief vacancy, Plaintiff's Exhibit #4. Interviews
21 were conducted and Captain Richard Van Luchene was the top
22 candidate.

23 12. On January 10, 1989, Alan Tandy froze the selection
24 procedure for the fourth battalion chief position, citing a
25

1 desire to have the new chief involved in the selection
2 process, Plaintiff's Exhibit #6.

3 13. On February 28, 1989, Alan Tandy advised Acting
4 Fire Chief Blee that authorization for the fourth battalion
5 chief position had been withdrawn, Plaintiff's Exhibit #7.
6 This was done by the City Administrator without any
7 negotiation with the Fire Fighters.

8 IV. DISCUSSION

9 1. This case puts the Board of Personnel Appeals,
10 (BOPA) in a difficult position. At the root of this is
11 whether the City had a duty to bargain over the creation or
12 elimination of the fourth battalion chief position. This
13 question also will undoubtedly come to bear before the
14 arbitrator and much of the evidence before BOPA will no doubt
15 also appear before the arbitrator.

16 The BOPA has adopted a policy of deferring certain cases
17 to arbitration under the Collyer Doctrine, Collyer Insulated
18 Wire, 77 LRRM 1931. In this case neither party to this
19 matter has raised jurisdiction as an issue. Specifically,
20 the City of Billings has not raised deferral to arbitration
21 as a defense to the unfair labor practice charges. In the
22 absence of deferral as a defense the NLRB has declined to
23 defer to arbitration under Collyer, supra. See for
24 instance, NCR Corporation and Airline and Steamship Clerks,
25 117 LRRM 1062. There is no indication that the BOPA would

1 hold otherwise and, in fact, the Courts have recognized the
2 concept of dual jurisdiction between the arbitrator and the
3 NLRB, NLRB v. Huttig Sash and Door Co., 377 F.2d 964, relying
4 upon NLRB v. C & C Plywood, 87 S. Ct. 559, 64 LRRM 2065
5 (1967).

6 The BOPA has to determine whether the City of Billings
7 committed an unfair labor practice under 39-31-401(1) and
8 (5). There are no charges before the BOPA of discrimination
9 under 39-31-401 (3) MCA. The question is whether the City
10 refused to bargain in good faith thereby interfering with and
11 restraining employees in the exercise of rights guaranteed in
12 39-31-201?

13 2. Those things which are ordinarily in the purview of
14 only one party, i.e., internal union affairs or management's
15 right to hire, and fire are permissive subjects of
16 bargaining. A party does not have to bargain over permissive
17 subjects. The basic question before the hearing examiner is
18 whether the creation of a fourth battalion chief position is
19 a mandatory subject of bargaining.

20 Under 39-31-406 MCA the preponderance of evidence
21 standard applies to unfair labor practice charges. Also see
22 Board of Trustees v. State of Montana, 103 LRRM 3090, 604
23 P.2d 770. A universally accepted definition of preponderance
24 of evidence is found in the Montana Jury Instruction Guide
25 which states:

1 By preponderance of the evidence is meant such evidence
2 as, when weighted with that opposed to it, has more
3 convincing force and from which it results that the greater
4 probability of truth lies therein. This means that if no
5 evidence were given on either side of an issue, your finding
6 would have to be against the party asserting that issue. In
7 the event the evidence is evenly balanced so that you are
8 unable to say that the evidence on either side of an issue
9 preponderates, that is, has the greater convincing force,
10 then your findings on that issue must be against the person
11 who has the burden of proving it. (Jury Instructions no.
12 21.0)

13 The Fire Fighters present evidence indicating the number
14 of battalion chiefs, not just the hours of a fourth
15 battalion chief was negotiated seemingly leading to the
16 conclusion that the number of battalion chiefs was a
17 mandatory subject of bargaining. The City's arguments are
18 equally convincing that the amendment only dealt with hours
19 of work for that position - a mandatory subject of bargaining
20 under the agreement and the law. The City's argument that
21 the creation of a position is not a mandatory subject of
22 bargaining is also convincing particularly in light of the
23 management rights clause of the contract and the provisions
24 of 39-31-303 (5) MCA.

25 All evidence being considered the City's position is
supported by the evidence and the law. There is not a
preponderance of evidence to show that the City of Billings
negotiated over creation of a fourth battalion chief
position. Even if the City did negotiate over creation of the
position it is a permissive subject of bargaining. " By once

1 bargaining and agreeing on a permissive subject, the parties,
2 naturally do not make the subject a mandatory topic for
3 future bargaining." See Allied Chemical and Alkali Workers
4 Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 LRRM
5 2974, 2985, (1971).

6 As to a requirement to negotiate over the elimination of
7 a fourth battalion chief position, neither the evidence nor
8 authority cited show that elimination of a fourth position
9 was a mandatory subject of bargaining. A unilateral change
10 in a permissive subject of bargaining is properly pursued
11 through the grievance procedure, NLRB v. Katz, 369 U.S. 736,
12 50 LRRM 2177 (1962) as is currently happening.

13 3. The City has not failed to implement the provisions
14 of the agreed upon language as the language pertains to hours
15 of work for a fourth battalion chief, if that position should
16 be filled. If the position is filled and the hours are not
17 implemented there may well be a contract violation. At this
18 point the Union has failed to prove that the City has failed
19 to implement the agreement.

20 4. As to the argument of the Fire Fighters that the
21 Fire Chief by virtue of 7-33-4104(1) in some way possesses
22 sole discretion and authority over matters involving the Fire
23 Department, this argument simply is not persuasive. The case
24 cited by the Fire Fighters, Billings Firefighters Local 521
25 v. City of Billings, 694 P.2d 1335, 42 St. Rptr. 112, (1985)

1 does spell out limitations of the Billings City Charter as
2 applies to minimum standards for Fire Departments, however,
3 it does not give the Chief the authority the Fire Fighters
4 would have him have. As the Court stated:

5 As previously mentioned, under Art. XI, Sec. 5(3), Mont.
6 Const., charter provisions establishing executive ,
7 legislative and administrative structure and
8 organization control over statutory provisions. As a
9 result, the organization and management structure of the
10 fire department may properly be subject to the self
11 government powers of the city.

12 Clearly, the Chief can negotiate on behalf of the City,
13 but it is the City that has final say over what is
14 negotiated.

15 V. CONCLUSIONS OF LAW

16 1. The City did not violate 39-31-401 (1) or (5)
17 because it had no duty to bargain over the creation of a
18 fourth batallion chief position. The City did have a duty to
19 bargain over hours for the position, but it did not
20 bargain to create the position.

21 2. Section 39-31-303 (5) MCA gives the City the right
22 to unilaterally create positions.

23 3. The December 1988 amendment does not set the number
24 of batallion chiefs at four and does not reflect the City's
25 desire to create the fourth batallion chief position through
bargaining with the Union on a permissive subject.

VI. RECOMMENDED ORDER

1 It is recommended that Unfair Labor Practice Charge 14-
2 89 be dismissed.

3 Dated this 28th day of September, 1989.

4
5 Board of Personnel Appeals

6 By: 

7
8
9 NOTICE: Exceptions to these Findings of Fact, Conclusion of
10 Law, and Recommended Order, may be filed within twenty (20)
11 days of service. If no exceptions are filed the Recommended
12 Order will become the Order of the Board of Personnel
13 Appeals.

14 * * * * *

15 CERTIFICATE OF SERVICE

16 The undersigned does certify that a true and correct
17 copy of this document was served upon the following on the
18 28th day of June, 1989, postage paid and addressed as
19 follows:

20 Jeffrey T. Renz
21 Attorney at Law
22 724 Grand Ave
23 Billings, MT 59101

24 James Tillotson
25 Billings City Attorney
P.O. Box 1178
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